

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Michael and Nicole Westbom)	
Charging Party,)	
)	
v.)	HRC Charge No. HV09-0012
)	HUD Charge No. 01-09-0175-8
Michael Cassidy,)	
Respondent.)	

FINAL DETERMINATION

Pursuant to 9 V.S.A. §4554, the Vermont Human Rights Commission enters the following Order:

The following vote was taken on a motion to find that there are reasonable grounds to believe that Michael Cassidy, the Respondent, illegally discriminated against Michael and Nicole Westbom, the Charging Party, in housing on the basis of minor children in violation of 9 V.S.A. §4503 (a)(2) of the Vermont Fair Housing and Public Accommodations Act.

Joseph Benning, Chair	For <input type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input checked="" type="checkbox"/>
Nathan Besio	For <input type="checkbox"/>	Against <input type="checkbox"/>	Absent <input checked="" type="checkbox"/>	Recused <input type="checkbox"/>
Shirley Boyd-Hill	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Mary Marzec-Gerrior	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Donald Vickers	For <input checked="" type="checkbox"/>	Against <input type="checkbox"/>	Absent <input type="checkbox"/>	Recused <input type="checkbox"/>
Entry: Reasonable grounds <input checked="" type="checkbox"/> Motion failed <input type="checkbox"/>				

2. Because the Human Rights Commissioners found that there are reasonable grounds to believe that Michael Cassidy, the Respondent, illegally discriminated against Michael and Nicole Westbom, the Charging Party, in violation of the Vermont Fair Housing and Public Accommodations Act, a final attempt to resolve Charge No. HV09-0012 through settlement shall be completed by September 18, 2009.

Dated at Montpelier, Vermont this 18th day of March 2009.

By: VT HUMAN RIGHTS COMMISSION

Recused

Joseph Benning, Chair

Absent

Nathan Besio

Shirley Boyd-Hill

Shirley Boyd-Hill

Mary Marzec-Gerrior

Mary Marzec-Gerrior

Donald R. Vickers

Donald Vickers

INVESTIGATIVE REPORT
HRC Case No.: HV09-0012
HUD Case No.: 01-09-0175-8

CHARGING PARTY: Michael and Nicole Westbom

RESPONDING PARTIES: Michael Cassidy

CHARGE: Housing/minor children

Summary of Charge: On December 11, 2008, Ms. Westbom filed a charge of housing discrimination based on occupying a dwelling with one or more minor children. Specifically, Ms. Westbom alleges that Mr. Cassidy's practice of charging a \$50 per person additional monthly rental fee for tenants that have more occupants in a dwelling than number of bedrooms in that unit discriminates against families with minor children.

Summary of Response: On December 29, 2008, Mr. Cassidy filed a response stating that he did not discriminate against the Westboms because they intended to occupy one of his dwellings with a minor child. Specifically, he stated that the additional per person rental fee is applied to all people, not just children and that the Westboms were aware of his practice when they signed their lease. Additionally, he stated that he incurs extra costs when a unit is occupied by more people than the number of bedrooms in the unit.

Preliminary Recommendations: This investigation makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that Mr. Cassidy discriminated against Michael and Nicole Westbom in violation of 9 V.S.A. §4503(a)(2) of the Vermont Fair Housing and Public Accommodations Act.

INTERVIEWS

11/21/08, 12/30/08, 1/13/09, 1/27/09 & 2/3/09– Michael Cassidy (phone conversations)

11/24/08 – Nicole Westbom

1/30/09 – Kathleen Berk, Executive Director Vermont Housing Authority

DOCUMENTS

- Discrimination Charge – 12/11/08
- Responses to Charge – 11/7/08 & 12/26/08
- Copies of rental applications – 8/3/08 & 8/14/08
- Respondent's response to a request for information – 1/20/09
 - copies of trash removal invoices
 - written answers to investigative questions

ELEMENTS OF PROOF for Disparate Impact *Prima Facie* Case

- 1) The Westboms are members of a protected class and were subjected to a housing practice that could have a disparate impact on that protected class**
- 2) There is statistical evidence sufficient to show that the practice caused an adverse effect on the protected class**

I. FACTS

a) Undisputed Facts

Michael Cassidy, d/b/a Cassidy Properties, owns 65 rental units including a nine unit complex at 31 Hyde St, Burlington, Vermont. During the time period that the Westbom's rented from Mr. Cassidy at 31 Hyde Street, Burlington, VT, seven of the nine units in that complex paid extra per person charges. Five of the seven units that paid extra

per person monthly fees had minor children residing in that unit.¹

In early August 2007, Ms. Westbom's brother and his girlfriend applied to rent a 3-bedroom apartment from Mr. Cassidy at 31 Hyde Street, Burlington, Vermont. They were told that the monthly rent would be \$1310 plus an additional \$50 a month because they intended to occupy the apartment with his sister, Nicole, and her husband. Mr. Cassidy has a rental policy that is printed on the application stating, "Any number of people to live in this unit beyond the number of bedrooms will pay an additional fee as follows: \$50.00 per person if no utilities are included in rent, \$55.00 if hookups are included, \$70.00 if heat and hot water are included." The Westboms and the other tenants were required to put down a one month's rent security deposit. The unit rented by the Westboms did not include utilities.

Approximately two weeks after Nicole Westbom's brother and girlfriend filled out their application, the Westboms also filed out an application for the same apartment. At that time the Westbom's were told that because their 10 month-old daughter would also be residing in the apartment, the rent would be increased another \$50 a month per Mr. Cassidy's rental policy.

b) Statement of Ms. Westbom

Ms. Westbom stated that her brother had told Mr. Cassidy at the time he submitted his application that the Westbom's 10-month old daughter would also be living at the apartment. Ms. Westbom explained that they had already given notice to their previous landlord

¹ This investigation asked Mr. Cassidy to provide the number of units that were paying extra rental amounts and how many of those units had minor children residing in the unit for three different dates over a 14 month period. Mr. Cassidy declined stating that the figures he supplied applied to whole 14-month period. This investigation also asked for this information for all of his rental units but he did not provide it.

when Mr. Cassidy informed them of the second \$50 a-month rental fee. Because they had given notice she felt there was no choice but to move in and pay the additional fee. The Westbom's paid the additional fee for one year.

c) Statement of Mr. Cassidy

Mr. Cassidy stated that Ms. Westbom's brother told him there would be a total of four people in the apartment and that it was when the Westbom's filled out their application that he became aware of the fifth occupant, the 10-month infant.² According to his policy he increased the monthly rent another \$50 per month.

Mr. Cassidy stated that the extra monthly rent is needed to cover the extra costs associated with more people living in a unit; such as trash removal, general wear and tear, time involved with dealing with additional people, additional utilities, the possibility of additional insurance claims, and generally more problems and issues that have to be dealt with because more people reside in a unit. He contends that he would lose "hundreds and thousands of dollars a year" if he did not charge the "extra" monthly rental fee and he likened his policy to paying higher rates at a hotel for extra people.³

This investigation asked Mr. Cassidy numerous times to provide specific documentation that would support his claim that he incurs additional costs equal to the additional amounts of rent that he charges. In response this investigation received 16 pages of invoices for trash removal and a hand-written note stating, "we had to increase

² The applications filled out by Ms. Westbom's brother and his girlfriend are blank in the section asking if there will be any additional occupants.

³ Originally, Mr. Cassidy stated that he "would be out of business" if he did not impose "monetary limits on the number of people per unit." He later stated that perhaps that statement was an exaggeration.

the size of our dumpster years ago because of more people.” This investigation asked Mr. Cassidy to clarify how the invoices support his statement that there are extra costs for more people.⁴

Mr. Cassidy justified his practice stating that many property owners use the same policy he does, a per person rental charge to determine their rents. This investigation asked Mr. Cassidy to provide supporting documentation for this statement – he did not.

Finally, this investigation questioned Mr. Cassidy regarding the common practice used by property owners that bases rent on the number of bedrooms, location, size and other reasons related to the unit, not based on the number of people who rent the unit. Mr. Cassidy told this investigation again that most of the property owners he knew charged on a per person basis like he does. Mr. Cassidy told this investigation that he would be unable to control the number of people in his units if he did not charge extra for “extra” people.

d) Statement of Kathleen Berk

This investigation asked Kathleen Berk, the Director of Housing and Program Administration, Vermont State Housing Authority (VSHA), how often she has encountered property owners charging on a per person basis for their rent amount. She stated that in all the rental situations that she has dealt with a very small percentage might have a per person rental charge policy, but that it was usually a “mom and pop” situation that involved the property owner supplying utilities. She added that “we [VHA] would object to that [type of rental

⁴ Mr. Cassidy left a voice message in response to this investigation’s request for clarification regarding what the invoices documented. Mr. Cassidy’s explanation did not clarify his position for this investigation. This investigation contacted Mr. Cassidy again and requested that he provide documentation to support his contention that the extra rent collected was justified to cover additional costs specific to extra people being in a unit.

arrangement].” Ms. Berk also said that she believed a per person rental charge would be “suspect.”

Ms. Berk stated that VHA oversees 3200 private rental units and 3000 project based rental units.

e) Additional Information

- This investigation contacted numerous sources⁵ to determine if charging a rental amount based on the number of people occupying a unit was a common or general practice. This investigation found little to support Mr. Cassidy’s claim that this is a common or general practice. The most supportive remark for Mr. Cassidy’s policy was provided by Vermont Apartment Owner’s Association. The Association stated, that it did not “have any statistical information on the number of landlords who follow this practice, but [that it does] know that there are landlords who base their rents on this idea.”
- The City of Burlington has occupancy standards that limit the number of occupants in a housing unit based on the square footage of the unit. City of Burlington Municipal Code, Chapter 18, Article VI, Div. 4 §§18-90, 91.

ANALYSIS

Vermont’s Fair Housing and Public Accommodations Act (FHPAA), **9 V.S.A. §4503(a)(2)** states:

It shall be unlawful for any person:

⁵ Because this investigation did not want to only rely on its previous housing investigation experiences relating to how property owners set their rents it sought opinions from a number of sources on this subject. These sources included nationwide landlord associations, craigslist rental ads, local housing authorities in Vermont, and other housing professionals who may have had many contacts with landlords.

To discriminate against, or to harass any person in the terms, conditions or privileges of the sale or rental of a dwelling or other real estate, or in the provision of services or facilities in connection therewith, because of the race, sex, sexual orientation, age, marital status, religious creed, color, national origin or handicap of a person, or because a person intends to occupy a dwelling with one or more minor children, or because a person is a recipient of public assistance.

Elements of Proof

Prima facie case:

- 1) The Westboms are members of a protected class and were subjected to a housing practice that could have a disparate impact on that protected class**
- 2) There is statistical evidence sufficient to show that the practice caused an adverse effect on the protected class⁶**

To prevail in this case the Westboms must first prove each of the above-mentioned elements by a preponderance of the evidence. (See *In re Smith*, 169 Vt. 162, 168 (1999) ("Our case law provides that a preponderance of the evidence is the usual standard of proof in state administrative adjudications."))

If the Westboms prove a *prima facie* case the burden shifts to the respondent to offer a legitimate business reason for the challenged practice.⁷ Then if Mr. Cassidy offers a legitimate business reason for the challenged practice the burden shifts back to the charging party to prove that the business reason is either pretext or that an alternative

⁶ Adopted from Kovacevich v. Kent State Univ. 224 F.3d 806, 830 (6th Cir. 2000) (Setting forth the elements of a *prima facie* case for disparate impact discrimination claim under the Federal Fair Housing Act.)

⁷ Some jurisdictions use a "business necessity" standard but this investigation used the lower legitimate business reason standard. See Dept. of Housing and Urban Development v. Mountain Side Mobile Estates Partnership, 56 F.3d 1243 (10th Cir. 1995), (discussing the "business necessity" standard for respondents.)

housing practice exists that “would achieve the same business ends with a less discriminatory impact.”⁸

Discussion of the Elements

Whether the Westboms are members of a protected class and were subjected to a housing practice that could have a disparate impact on that protected class.

The Westboms had a 10-month old daughter who resided with them when they lived in Mr. Cassidy’s rental unit at 31 Hyde Street, Burlington, VT. The Westboms and the other residents of their three-bedroom apartment, totaling five people, had to pay two additional \$50 a month rental fees for the three bedroom apartment they leased from Mr. Cassidy. The only way for the Westboms and their daughter to avoid paying an additional monthly fee, while renting from Mr. Cassidy, would have been for the couple to rent a three bedroom apartment alone. If they had rented a two bedroom apartment, a very common practice for a couple with one child, they still would have been subject to an additional \$50 a month fee because according to Mr. Cassidy’s practice an additional fee must be paid for each person over the number of bedrooms in a unit. Mr. Cassidy’s practice of charging rent based on the number of people in a unit clearly could adversely affect families with minor children.⁹

⁸ *Id.* at 830.

⁹ There are numerous examples of how Mr. Cassidy’s practice would adversely affect people with minor children: if a couple with one or two children rented a two bedroom apartment they would be subjected to one or two additional \$50 fees; if a single parent with three children or a couple with three children rented a three bedroom unit they would also be subjected to additional monthly rental fees.

Whether there is statistical evidence sufficient to show that the practice caused an adverse effect on the protected class

In a disparate impact case the “relevant question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater impact on members of a protected class.” Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir.) cert. denied, 519 U.S. 1041 (1996). Disparate impact analysis is applied to situations where a practice is neither discriminatory on its face nor applied in a discriminatory manner. A key in proving a disparate impact claim is statistical evidence that shows the responding party’s practice has a greater impact on protected class members than others. Betsey v. Turtle Creek Associations, 736 F.2d 983 (4th Cir. 1984).

Mr. Cassidy stated that the rental complex where the Westboms lived had nine units. He said that seven of the nine units paid extra fees and that five of the units that paid extra fees included minor children. Using the information provided by Mr. Cassidy, it statistically translates to 71% of the units that paid extra fees were units with minor children. Additionally, the units with minor children only accounted for 55% of the total number of units. Mr. Cassidy’s practice of charging additional rental fees based on the number of people occupying the unit had a significantly greater impact on families with minor children than those without minor children.¹⁰

¹⁰ Some general housing statistics for the City of Burlington include: 56.3% of all housing units are renter occupied; 23.1% of all Burlington households have one or more people under the age of 18; rental vacancy rate is 1.7% - 2005-2007 Census information from American Community Survey, <http://factfinder.census.gov>.

Whether Mr. Cassidy can offer a legitimate business reason for his challenged practice

Mr. Cassidy told this investigation that if he did not charge rent based on the number of occupants in a rental unit he would lose hundreds and thousands of dollars. He spoke of numerous additional costs he has when more people live in a single unit – including trash removal, wear and tear, time involved dealing with additional people, additional utilities (the unit that is subject of this investigation did not include utilities in the rent), the possibility of additional insurance claims, and generally more problems and issues that have to be dealt with because more people reside in a unit. Increased cost could arguably be a legitimate business reason for charging more rent when there are more people in a unit.

Whether Mr. Cassidy's business explanation was pretext or whether an alternative housing practice exists that would achieve the same business ends with a less discriminatory impact.

In determining Fair Housing Act claims the trier of fact may look for guidance from Title VII, employment discrimination cases. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir. 1988). In Title VII cases only objective evidence, as opposed to the employer's mere speculation or subjective opinion, that a practice addresses an employer's job relatedness concerns can establish a legal rebuttal. Dept. of Housing and Urban Development v. Mountain Side Mobile Estates Partnership, 56 F.3d 1243 (10th Cir. 1995). See also United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. (1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694

(1975) (“In examining the defendant's reason, we view skeptically subjective rationales concerning why he denied housing to members of protected groups.”) “There is less reason to be wary of subjective explanations, though, where a defendant provides **objective evidence** indicating that truth lies behind his assertions of nondiscriminatory conduct (emphasis added).” Soules v. United States Dept. of Housing and Urban Development, 967 F.2d 817, 822 (2d Cir. 1992).

This investigation explained to Mr. Cassidy numerous times the need to provide specific, concrete documentation that supported his allegation that he would lose hundreds and thousands of dollars if he did not charge rents based on the occupancy of his units. He also stated that he would not be able to control the number of people in each unit.¹¹ He stated that it was obvious that more people cost him more money and he likened his practice to that of hotels/motels that charge on a per person basis.

These are subjective rationales that are not supported but objective evidence. The only documentation Mr. Cassidy provided this investigation to support his position were 14 pages of invoices from All Cycle, Inc., a trash collection company. The invoices covered a period from 1/08 – 8/08 and were for various unidentified addresses. The only explanation that accompanied the invoices was a hand written note stating, “We had to increase the dumpster size yrs ago because of the additional people living there.” There was a copy of a small receipt dated 12/17/07 for \$197.00 on the note page.

After receiving this information this investigation contacted Mr. Cassidy again and explained that the information, even after he offered a brief verbal explanation of the invoices, did not provide

¹¹ However, the City of Burlington has an occupancy ordinance to control the number of persons in housing units.

evidence to show that the costs were due to additional people or that his trash collection costs increased because of more people. Mr. Cassidy's explanation also failed to show how that increase cost corresponded with the increased rental charges. This investigation asked him if the additional pick up costs for large items were all from units with more people and he replied that he could not be sure. This investigation again asked for documentation that would show that the alleged increased costs were equal to the increase rents he collected. Mr. Cassidy stated that this type of documentation would require a lot of time and he decided that he would rather respond to the investigative report instead of providing additional documentation to this investigation.¹² Because of Mr. Cassidy's lack of documentation to support his subjective business rationales, this investigation believes his business reason must be found to be pretext.

Even if Mr. Cassidy's business rationale were not pretext, based on the Human Rights Commission's own extensive experiences dealing with hundreds of property owners this investigation believes that most property owners set their rents based on a number of reasons relating to the unit's characteristics and not the number of people residing in the unit. However, because Mr. Cassidy alleged that most of the property owners he knows use the same method he does to set rents, this investigation sought input from a number of professionals in the rental housing field. This investigation did not find any evidence that Mr. Cassidy's method is the common practice.

¹² Mr. Cassidy expressed frustration and resistance to the need to provide more documentation to support his stated business reason for the extra rent charges. This investigation then explained that even if he provided documentation it might not be sufficient to overcome the hurdle that if there is a less discriminatory way to achieve the same business end this investigation could recommend a reasonable grounds determination.

Ms. Kathleen Berk, Director of Housing and Program Administration, works with Vermont property owners who own over 6000 rental units. She told this investigation that she has rarely seen a property owner use a per person method to determine rent. She stated that the very few times she has it was a “mom and pop” operation and that the extra charge they sought was to cover utilities. (The unit the Westbom’s rented did not include utilities.) Ms. Berk added that VSHA would not support the practice of charging additional amounts for extra people and found it to be suspect.

Given the reality that very few property owners¹³ base their rents on the number of people occupying a unit and continue to be in business, this investigation believes that Mr. Cassidy has an effective less discriminatory means to achieve his business means.

Conclusion

Based on the evidence produced as a result of this investigation there is sufficient basis to support the alleged discrimination charge by a preponderance of the evidence.

PRELIMINARY RECOMMENDATION: This investigative report recommends that the Human Rights Commission find that there are **Reasonable Grounds** to believe that Michael Cassidy d/b/a Cassidy Properties discriminated against Nicole and Michael Westbom in violation of 9 V.S.A. §4503(a)(2) of Vermont’s Fair Housing and Public Accommodations Act.

¹³ This investigation did not find even one specific property owner that uses Mr. Cassidy’s method but accepts others’ assertions that there are some who do.

Ellen T Maxon, Investigator

Date

Approved by:

Robert Appel, Executive Director

Date